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# Birthright Citizenship: A Constitutional Right?

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Dear Colleague:

One of the benefits of serving in the Congress is the opportunity to participate in the hearing process where we are exposed to expert testimony on a host of subjects relating to the most important questions facing our country. One such opportunity recently arose in our Judiciary Subcommittee on Immigration, Border Security, & Claims. Congressman Hostettler chaired an oversight hearing on the subject of "Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty." In this regard, I wanted to bring to your attention some very interesting testimony by a friend and former colleague of mine at Chapman University Law School, Dr. John Eastman.

Professor Eastman challenged the subcommittee to rethink the notion of unqualified birthright citizenship in the wake of 9-11. He illustrated the relevance of this question with the example of Yaser Hamdi, an enemy combatant who had taken up arms in support of the Taliban in Afghanistan. Although Hamdi was originally held at Guantanamo, when it was discovered that he was born in the U.S. -- despite returning to Saudi Arabia as a toddler -- he was transferred to Norfolk, Virginia. Hamdi then filed a writ of habeas corpus which went all the way to the United States Supreme Court. In *Hamdi v. Rumsfeld*, the Court held that he had a constitutional right to file a due process challenge to his detention. However, in dissent, both Justice Scalia and Justice Stevens declined to accept that Hamdi was necessarily a U.S. citizen. Instead, they referred to him as a "presumed American citizen."

The obvious question presented by *Hamdi* is how someone with such attenuated connection to the United States could claim citizenship and the protection of American law. The answer lies in the common assumption that the mere fact of his birth on U.S. soil automatically conferred such status on Hamdi. The pertinence of this issue is further heightened by the magnitude of the number of children born to undocumented aliens in the United States. In my own state of California for example, nearly 1 out of 5 children born each year are born to mothers who have entered the U.S. without benefit of papers.

The provocative question raised by Professor Eastman is whether the common assumption relating to birthright citizenship is in fact valid. For those of us in the textualist camp, such a query should begin with the language of the 14th Amendment itself. The citizenship clause provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The interpretation of this language by most commentators has entailed a geographic determination of citizenship, i.e. if you are born in the U.S., then you are an American citizen. However, Professor Eastman suggests that such a reading is insufficient in that it fails to incorporate all of the language of the amendment. The language relating to those who are born in the United States is qualified by the proviso that they must also be *"subject to the jurisdiction thereof."*

The question of what precisely the 14th Amendment means can be answered by both its historical background and the statements of its authors. On this basis, Professor Eastman points us toward the language of the *Civil Rights Act of 1866* which provided that "All persons born in the United States, and *not subject to any foreign power,* excluding Indians not taxed, are hereby declared to be citizens of the United States." The Act is generally considered to be important in interpreting the 14th Amendment because the impetus for the latter was largely driven by the desire to provide a Constitutional imprimatur to the content of the statute. The implication of the language in the Act is that a child born to parents who were the subjects of a foreign power should not qualify for citizenship on the mere basis of birthright. Professor Eastman supports such a conclusion with evidence from the legislative history of the 14th amendment. Both Senators Lyman Trumbell and Jacob Howard understood the phrase "subject to the jurisdiction" to mean not owing allegiance to anybody else.

Early U.S. Supreme Court opinions following the ratification of the 14th Amendment provide additional evidence that the framers of the amendment sought to ratify the approach of the Civil Rights Act, persons born in the U.S were entitled to citizenship as long as they were not born to the subjects of a foreign power. Professor Eastman points to dicta (language not directly controlling the holding of the court) in the *Slaughter House Cases* (which provided an early interpretation of the 14th Amendment), as well as the holding in *Elk v. Wilkins* (a person was not subject to the jurisdiction of the U.S. at birth if he or she was merely subject in some respect or degree) as support for his argument. Eastman notes that the legal principle recognized in these decisions was acknowledged in Thomas Cooley's (1824-1898) *Treatise on Constitutional Law in America* which stated that "subject to the jurisdiction" of the United States "meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government."

It is somewhat ironic that Justice Horace Gray (who penned the earlier *Elk v. Wilkins* decision) in a subsequent case, *Won Kim Ark*, held that the decision in *Elk v. Wilkins* was limited to Indians born in the United States and had no bearing on the citizenship of children born to other groups of foreign parents in the U.S. Professor Eastman counters that the holding in *Won Kim Ark* should not be extended in a broad fashion beyond its unique facts. The case involved a child of Chinese immigrants who legally entered the United States and were subject to a treaty that prohibited the renunciation of Chinese citizenship. In pointing to the dissenting opinion in *Won Kim Ark*, Professor Eastman suggests that there is a historical incongruity between the Court's opinion and the roots of the American order. He argues that Justice Gray's reasoning was steeped in a "lingering vestige of feudalism that the Americans had rejected, implicitly at the time of the Revolution, and explicitly with the 1866 Civil Rights Act and the Fourteenth Amendment."

This is a critical point raised by Professor Eastman which goes to the heart of the issue of citizenship. The notion of consent is foundational to both citizenship and American constitutional governance. Influenced by Lockean social contract theory, the preamble of our constitution itself reflects the consensual acceptance of the new political Union of "We the People." One aspect of the idea of consent of the governed relates to the question of citizenship itself. As Eastman argued in his testimony, one cannot come here and claim citizenship without the consent of the political community and by the same token, the sovereign cannot determine one to be a citizen of the state without his or her consent. This is quite a different notion than the idea that by birth alone, one becomes a subject of the sovereign in the country in which he or she is born. In a very real sense, the Declaration of Independence was a rejection of this unilateralist approach to citizenship.

It is also noteworthy that the rather open-ended interpretation of birthright citizenship commonly accepted in the United States is somewhat anomalous in comparison with other industrialized nations. For example, the United Kingdom, Germany, France, Spain, Australia, New Zealand, and Ireland in general require that at least one parent have legal status in order for a child to attain citizenship at birth. The United Kingdom, Ireland, Australia, and New Zealand have moved away from birthright citizenship, while Germany has historically not been a birthright citizenship nation. The concept of birthright citizenship is more common in newer nations and it should be noted that both our northern and southern neighbors, Canada and Mexico recognize birthright citizenship.

While there is some controversy among legal scholars as to whether a constitutional amendment would be necessary to alter the availability of birthright citizenship, Professor Eastman, an eminent constitutional scholar himself, points to the plenary jurisdiction of the Congress over immigration policy (Article I, Section 8) as a source of legislative authority to define and to determine our nation's laws relating to naturalization. In fact, Eastman suggested that a new statute might not even be necessary since the existing law tracks the 14th amendment itself. Consequently, he concluded that a resolution might in and of itself suffice.

At a time when the issue of immigration reform presents itself as one of the most critical questions facing the Congress, Professor Eastman has provided us with "food for thought" concerning a foundational question facing any Republic confronting the nature and meaning of citizenship.

Sincerely,

Daniel E. Lungren
Member of Congress